No. 17-1104

IN THE

Supreme Court of the United States

AIR AND LIQUID SYSTEMS CORP., *et al.*,

Petitioners,

v.

ROBERTA G. DEVRIES, EXECUTRIX OF THE ESTATE OF JOHN B. DEVRIES, DECEASED, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

John B. DeVries

In December 2012, John B. DeVries ("Mr. DeVries") and Roberta G. DeVries ("Plaintiff" or "Respondent") filed a complaint in the Philadelphia County Court of Common Pleas.[1] Mr. DeVries, a lifetime non-smoker, contracted lung cancer caused by his exposure to asbestos-containing products during his service in the United States Navy from 1957-60 aboard the destroyer *U.S.S. Turner.*

Mr. DeVries' only exposure to asbestos occurred while he was in the United States Navy. He testified that the process of maintaining the equipment in the engine room exposed him to asbestos dust on a regular and frequent basis. The *Turner* had two engine rooms and two fire rooms, with one large turbine in each engine room. *See* Appendix 346, *DeVries v. Buffalo Pumps*, No. 15-1278 (3d Cir.)("DJA")

As an officer, Mr. DeVries supervised the maintenance mechanics and boiler tenders, and he also performed mechanical work himself. DJA 327-330. He worked around boilers, pumps, generators, switchboards, standby diesel generators, blowers, steam traps, and turbines. He spent "a lot of time" with the sailors who maintained the equipment in the engineering compartments. DJA 346. Mr. DeVries and the crew he supervised performed mechanical work on these boilers, turbines and pumps. DJA 345-346.

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1. Defendants removed the case to federal court. Thereafter, Mr. DeVries died and his wife was substituted as party-plaintiff both as Executrix of his Estate and as Widow in her own Right.

Mr. DeVries' duties resulted in his being exposed to asbestos dust from the asbestos components because much of the equipment in the engineering spaces had essential asbestos-containing components that would wear out and need to be replaced over the useful life of the equipment. Pet. App. 61a; 78a; 86a. Mr. DeVries did not know who manufactured the replacement components or "wear parts" that they installed because these parts had been removed from the packaging when the parts were delivered to the engineering spaces.[2]

Mr. DeVries testified that the generators, turbines, fused draft blowers, circulating pump turbines, and the air compressor turbines aboard the *Turner* were made by either of CBS' predecessors-in-interest, Westinghouse Corporation or Sturtevant. DJA 623-627. Each of the boilers on the *Turner* had two Westinghouse Corporation ("Westinghouse") forced air blowers, which were insulated. DJA 623. Mr. DeVries was present when the steam ends of generators were opened and repaired

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2. Petitioner CBS/Westinghouse claims that it shipped its equipment to the Navy without any asbestos insulation installed. It claims that the Navy would have added the asbestos insulation essential for the safe functioning of the equipment when the equipment was installed on board the ships. Pet. App. 69a-70. The Third Circuit referred to this argument as the assertion of a "bare metal defense." Pet. App. 4a.

Other Petitioners (Buffalo Pumps and Foster-Wheeler in *DeVries*, and Ingersoll Rand Company in *McAfee*) have not denied that they shipped their equipment with factory-installed asbestos components, but claim that by the time Mr. DeVries or Mr. McAfee worked on the equipment, these asbestos components had already been replaced by parts whose manufacturers the two men could not identify. Pet. App. 61a; 84a-85.

with asbestos. DJA 621. He was also exposed to asbestos from repair of the Westinghouse blowers and turbines. DJA 623-627. Westinghouse designed its equipment to be insulated by asbestos-containing products and in some instances, Westinghouse incorporated asbestos-containing components in its equipment. DJA 643-644, 672-685. Westinghouse equipment and specifications for its U.S. Navy did not differ from Westinghouse equipment in private usage. DJA 643-661. Westinghouse knew that asbestos was dangerous since 1953. DJA 757-758.

Mr. DeVries also testified that there were pumps made by Buffalo Pumps ("Buffalo"), predecessor-in-interest to Air & Liquid Systems, Corp., on the *Turner*. He replaced asbestos packing himself and/or was close to others who replaced asbestos packing on these pumps. DJA 352-353. There were pumps throughout the ship for hot, cold or steam applications. DJA 1502-1503. Buffalo required asbestos-containing components for its pumps. DJA 411.

There were two Foster Wheeler LLC ("Foster Wheeler") condensers in the engine room of the *Turner*. DJA 1141, 1149. These condensers took the spent steam from the turbine, cooled it into water, and then recycled the water through the pumps to the boiler. DJA 1141. The connections to the condenser had gaskets. DJA 1149. Mr. DeVries was in the vicinity when the condenser's manhole gaskets were scraped off. This scraping created dust. DJA 1145-1146. Each of the two Foster Wheeler condensers had two flanged and gasketed connections for pipes; work on these also generated dust. DJA 1149. Further, Foster Wheeler also supplied 992 asbestos-containing gaskets to the *Turner*, which included both the original gaskets for installation of the condenser, as well as spare replacement

gaskets parts. DJA 1151-1153. Foster Wheeler required that its equipment be insulated with asbestos-containing block and pipecovering. DJA 1162.

Kenneth E. McAfee

Mr. McAfee served in the United States Navy as a bosun's mate aboard the *U.S.S. Voge*, *U.S.S. Davis*, *U.S.S. Yosemite*, *U.S.S. Butte*, *U.S.S. Nitro* and *U.S.S. Wanamassa* from 1969-89. His primary duties were as a rigger. From 1982-86, Mr. McAfee was assigned to the Philadelphia Naval Shipyard serving aboard another tugboat, the *U.S.S. Commodore*, with the same duties that he had had at Guantanamo Bay. Mr. McAfee thereafter worked as a rigger at the Philadelphia Naval Shipyard from 1990-1993 for Global Associates, Inc. dismantling mothballed Navy ships.

Mr. McAfee was exposed to asbestos dust from the Ingersoll-Rand Company's ("Ingersoll") compressors on board the *Wanamassa* from 1977-80, and at the Navy Yard from 1990-93. He was exposed to asbestos dust many times from removing and replacing asbestos gaskets on the Ingersoll compressors on the *Wanamassa*. *See* Appendix 98-100, *McAfee v. Ingersoll Rand Company*, No. 15-266 (3d Cir.)("MJA"). Mr. McAfee did not know who manufactured the replacement wear parts that he installed, as these parts had been removed from their packaging, so the wear parts may have been manufactured by a third party. Mr. McAfee was also exposed to asbestos dust from Ingersoll compressors on the *Commodore* at the Navy Yard when he removed asbestos gaskets and packing from the compressors. MJA 95-96.

Procedural History

Both Plaintiffs sued Petitioners-Defendants in negligence and §402A strict liability in their respective cases on the basis of a failure to warn of the hazards of using and maintaining the asbestos-containing equipment over its useful life. Petitioners-Defendants moved for summary judgment, relying not only on the bare metal defense, but also on the alleged immunity from liability under a government contractor defense pursuant to *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988).

The District Court found that there was evidence of Mr. DeVries' considerable exposure to asbestos dust from Buffalo's, Foster-Wheeler's and Westinghouse's equipment.[3] The District Court also found that there was evidence of Mr. McAfee's considerable exposure to asbestos dust from Ingersoll's equipment.[4] The District

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3. "There is evidence that Plaintiff [DeVries] was exposed to respirable asbestos dust from external insulation used in connection with Westinghouse turbines and blowers." Pet. App. 69a. "There is evidence that Plaintiff [DeVries] was exposed to respirable dust from gaskets in Foster Wheeler condensers. There is evidence that Foster Wheeler supplied condensers with asbestos-containing gaskets." Pet. App. 77a. "There is evidence that numerous Buffalo pumps were aboard the ship on which Plaintiff [DeVries] worked. There is evidence that Buffalo supplied asbestos-containing component parts (such as gaskets, packing and insulation) with these pumps. There is evidence that during the period 1957-1960, Plaintiff was exposed to respirable dust from packing and perhaps gaskets) inside these pumps, and from external insulation on some of these pumps." Pet. App. 86a.

4. "There is evidence that he [Mr. McAfee] was exposed to respirable dust from asbestos-containing gaskets, packing and

Court granted summary judgment on the bare metal defense, so it did not address the government contractor defense.

The appeals were consolidated for argument. After argument, the Third Circuit remanded the cases to the District Court for the District Court to consider the theory of negligence in maritime personal injury cases, the bare metal defense under negligence theory, and the applicability of recent federal and state opinions to negligence and the bare metal defense. Pet. App. 43a-52a.

On remand, the District Court again granted summary judgment to the Petitioners. Pet. App. 18a-42a. The District Court reiterated its original reliance on *Lindstrom v. A-C Product Liability Trust*, 424 F.3d 488 (6th Cir. 2005), a §402A strict liability case, and did not examine the elements of Plaintiffs' negligence claims, including those facts showing knowledge and foreseeable dangers, i.e. the scope of duty in negligence for foreseeable injuries. Respondents appealed again. The appeals were consolidated for briefing and argument. The Third Circuit reversed the District Court on the issue of maritime negligence in an opinion published at 873 F.3d 232, and remanded the case for further proceedings. Pet. App. 1a-17a. This Petition for Writ of Certiorari followed.

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insulation used in connection with various Ingersoll compressors. There is evidence that Ingersoll anticipated (and perhaps even recommended) use of asbestos-containing gaskets, packing and insulation with these compressors." Pet. App. 61a.

REASONS FOR DENYING THE PETITION

I. THERE IS NO NEED FOR REVIEW BECAUSE THERE IS NO GENUINE CONFLICT BETWEEN THE RULINGS OF THE THIRD AND SIXTH CIRCUITS ON THE SAME MATTER OR BETWEEN THOSE OF THE THIRD CIRCUIT AND THE RULINGS OF THIS COURT ON MARITIME NEGLIGENCE.

A. There is no circuit split because the Third Circuit's holding was limited to maritime negligence law for foreseeable injuries to sailors from third party wear parts, an issue not addressed by the Sixth Circuit.

This is a negligence case, and only a negligence case. This is not a "products liability" case because that term is commonly understood to refer to a §402A strict liability claim. Recovery under §402A was explicitly not addressed by the Third Circuit in this negligence case. Pet. App. 9a.

In contrast to the instant cases, the Sixth Circuit used the term "products liability" in an opinion that only discussed the elements of a §402A strict liability case. *Lindstrom v. A-C Product Liability Trust*, 424 F.3d 488 (6th Cir. 2005). The Petitioners' repeated use of the term "products liability" in their Brief to describe the issues in both of these cases blurs the difference between *Lindstrom* and these cases. When the Sixth Circuit's analysis in *Lindstrom* is carefully read, it is clear that *Lindstrom* was limited to a §402A strict products liability claim. The Third Circuit here decided the instant cases only with regard to Plaintiffs' negligence claims. Thus, there is no conflict that necessitates review.

Sup.C.R. 17.1(a) states that certiorari may be appropriate if there is a decision of a federal court of appeals that is in conflict with the decision of another federal court of appeals "on the same matter," but there is no similarity between the matters addressed by the two courts below sufficient to invoke Rule 17.1(a). At no point in its decision did the Third Circuit state that it disagreed with the Sixth Circuit's strict liability analysis in *Lindstrom*, nor did the Third Circuit acknowledge that it was creating a conflict with the Sixth Circuit. To justify a grant of certiorari, the conflict must truly be direct and must be readily apparent from the lower court's rationale or result. Stephen M. Shapiro, et al, *Supreme Court Practice* (10th ed. 2013) §4.5.[5] There is no "real and embarrassing conflict of opinion and authority."[6] The Third Circuit simply applied the controlling authority of this Court to issues not reached by the Sixth Circuit in *Lindstrom*.

Lindstrom's unaddressed issues were: 1) the defendant's liability for third-party asbestos-containing wear parts specified by the defendant under a negligence theory of recovery, and 2) this Court's prior directives that the fundamental policy of maritime law was to protect the sailor. The Sixth Circuit did not separately review the

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5. *See, e.g., United States v. Lorenzetti*, 651 F.2d 877, 855 (3d Cir. 1981) ("For the following reasons we reject the holding in *Ostrowski* [*v. Roman Catholic Archdiocese*, 479 F. Supp. 200 (E.D. Mich. 1979), *aff'd* 653 F.2d 229 (6th Cir. 1981)], and therefore, reverse the decision of the district court in the instant case.").

6. *See Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923).

elements of negligence: duty, breach of duty, causation and damages; the Third Circuit did.[7]

The Third Circuit held that the relevant inquiry was on manufacturer's "actions or omissions" and whether a manufacturer could "reasonably foresee" that those actions or omissions would cause the plaintiff's asbestos-related injuries. Pet. App. 7a. Strict product liability's emphasis is on the defendant's *product*; negligence looks to the defendant's *conduct*. Negligence analysis focuses on an actor's duty to engage in certain conduct, given the actor's actual or imputed knowledge. In maritime negligence "the duty of care includes the duty to anticipate danger that is reasonably foreseeable." Plaintiff offered evidence here that Westinghouse (CBS) had the requisite knowledge to make the danger to sailors foreseeable.[8] (DJA 757-758).

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7. The word "negligence" only appears twice in *Lindstrom*, once in the recitation of the theories of recovery in the plaintiff's pleadings in the presentation of the facts of the case, and secondly when the Sixth Circuit mentioned negligence in passing in its discussion of causation:

> Plaintiffs in products liability cases under maritime law may proceed under both negligence and strict liability theories. Under either theory, a plaintiff must establish causation. We have required that a plaintiff show, for each defendant, that (1) he was exposed to the defendant's product, and (2) the product was a substantial factor in causing the injury he suffered.
>
> *Lindstrom*, 424 F.3d at 492.

Lindstrom's actual holding was restricted to the quantum of asbestos exposure sufficient to establish causation rather the particular theory of recovery.

8. 1 Force & Norris, *The Law of Maritime Personal Injuries* § 8:8, at 8-37 (5th ed. 2004).

Although the term "bare metal defense" has been used in maritime asbestos personal injury cases for a decade, the issue here is not really the availability of an affirmative defense, but rather what the basic scope of the defendant's liability is in negligence. Foreseeability defines the duty in negligence, and therefore determines the defendant's potential liability.

Here maritime negligence looks at a defendant's knowledge that the routine maintenance of its equipment would necessarily include removing and replacing asbestos-containing parts so the equipment could continue to function safely and efficiently, and how that knowledge gives rise to a duty to undertake certain conduct, *i.e.*, the duty to warn about safe maintenance and repair, regardless of the identity of the manufacturer of the replacement parts. The failure to engage in the conduct of warning constituted a breach of duty.

The Sixth Circuit never discussed this duty to warn of known and foreseeable injuries that could occur during the normal use of the equipment, and whether the inclusion of asbestos-containing parts that would wear out and need replacement over the useful life of the equipment was foreseeable and known to be dangerous. Indeed, there is no mention of either of the words "duty" or "foreseeable" in the entire *Lindstrom* opinion. The Sixth Circuit chose to rely upon its reasoning in *Stark v. Armstrong World Industries, Inc.*, 21 F. Appx. 371 (6th Cir. 2001), a non-precedential opinion in which the Sixth Circuit found that there was a "bare metal" defense under §402A. *Stark* never considered whether this defense would be permissible in negligence, because Plaintiff Stark waived his negligence claim on appeal. *Stark*, 21 F. Appx. at 381, n.2.

Despite the Third Circuit's straightforward holding on maritime negligence here, Petitioners attempt to conjure up a circuit conflict that does not exist. Petitioners use the terms "products liability" and "negligence" interchangeably. Petitioners again mischaracterize *Lindstrom* and *Stark* as being both §402A and negligence cases, when a review of these cases clearly shows this to be incorrect. Any perceived lack of uniformity by the district courts on the issue of liability in negligence for third-party wear parts resulted from a misinterpretation of *Lindstrom*. Because the Third Circuit limited its opinion to maritime negligence only, and *Lindstrom* addressed maritime strict liability only, there is little likelihood of any future inconsistency in the circuit or district courts.

Furthermore, any claim that the Sixth Circuit might disagree in the future with the Third Circuit's interpretation of *Lindstrom* is pure speculation, and certainly not a basis for a grant of certiorari. When and if there is an overt expression of disagreement among the circuit courts on the "bare metal defense" under maritime negligence theory, then there might be a conflict of sufficient significance for this Court to address, but the current Petition presents a poor vehicle for review.

B. The Third Circuit followed this Court's precedent that the fundamental policy in maritime law is protection of sailors.

There is no conflict between the Third Circuit's opinion and the rulings of this Court. The Third Circuit followed the maritime policy towards injured sailors expressed in this Court's unanimous decision in *Moragne v. States Marine Lines*, 398 U.S. 375 (1970). The Third

Circuit correctly held that there was no justification for giving sailors less protection from foreseeable injuries from asbestos-containing equipment in negligence than that granted to land-based workers, and certainly no justification giving less protection in some federal district courts than in others. *Moragne* singled out for specific mention the "solicitude for sailors" as a fundamental principle of maritime law. 398 U.S. at 386-387. Yet Petitioners give *Moragne* and the policy of protecting sailors only a cursory discussion in their paean to uniformity, despite the fact that *Moragne* was the foundation for the Third Circuit's opinion.

The Third Circuit acknowledged the policy of solicitude for sailors as maritime law's first and foremost concern. Maritime law "principles included a special solicitude for the welfare of those men who undertook to venture upon hazardous and unpredictable sea voyages." *Moragne, Id.* at 387.[9] Nearly 200 years ago, then Circuit Judge Story cautioned against any qualification of this principle:

> Every court should watch with jealousy an encroachment upon the rights of seamen... Hence every deviation from the terms of the common shipping paper, (which stands upon the general doctrines of maritime law), is rigidly inspected; and if additional burthens or sacrifices are imposed upon the seamen

9. The maritime tradition of "jettison" also embodies a similar solicitude for the welfare of the sailors. As this Court recognized in *Lawrence v. Minturn*, 58 U.S. 100 (1855), it is lawful for a ship's captain to jettison cargo "if it be necessary for the common safety." *Id.* at 109. *See also E.I. duPont de Nemours & Co. v. Vance*, 60 U.S. 162 (1856).

> without adequate remuneration, the court feels itself authorised to interfere and moderate or annul the stipulation. And on every occasion the court expects to be satisfied, that the compensation for every material alteration is entirely adequate to the diminution of right or privilege on the part of the seamen.
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> *Harden v. Gordon*, 11 F. Cas. 480, 481 (D. Maine, 1823) (Story, J., riding circuit).

The Third Circuit recognized that the solicitude for sailors was not only one of the principles that made up the foundation of maritime law, but that solicitude was the "[f]irst and perhaps foremost" principle in any maritime personal injury law analysis. 873 F.3d at 238. The Third Circuit understood that *Moragne* was not a narrow ruling on the liability of shipowners and employers, but was rather one example of the broad foundations of maritime law. With the solicitude for sailors as the starting point, the obvious method for best furthering the solicitude principle was the use of a standard of foreseeability of harm.

This Court has held that a plaintiff can proceed in a personal injury action in either strict liability and in negligence or both in maritime. *East River Steamship Corp. v. Transamerica DeLaval, Inc.*, 476 U.S. 858 (1986); *Kermarec v. Compagnie Transatlantique*, 358 U.S. 625 (1959). Petitioners urge that there should be no distinction between a recovery under §402A in maritime personal injury law and recovery under a negligence theory in furtherance of their version of uniformity. According to Petitioners and their *amicus curiae*, these two theories of recovery must be uniform to the point of

being indistinguishable in the essential elements, at least with regard to sailors' injuries from third-party wear parts. Yet Petitioners' bright-line rule is a §402A strict liability rule under a theory that focuses solely on the defendant's product, while a negligence analysis focuses on the defendant's conduct, the consequences that flowed from a chosen course of action or inaction, and whether those consequences were foreseeable.[10] According to Petitioners, if strict liability does not have foreseeability as an element, then negligence cannot have it, either. This uniformity that Petitioners advocate has little to do with a conflict between circuits, but has much to do with conflating theories of recovery.[11]

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10. Petitioners also make the peculiar claim that the Third Circuit did not derive the foreseeability rule from the common law, but "relied on nothing beyond its own say-so." Pet. at 26. The Third Circuit's reference to Prosser and Keeton's treatise on torts as cited in *Paroline v. United States*, 572 U.S. —, 134 S.Ct. 1710, 1720 (2014) should have sufficed to put the Petitioners on notice that the Third Circuit was applying traditional common law tort principles. Pet. App. 8a.

Using foreseeability to define negligent action in American law is evident as early as 1814 in *Cole v. Fisher*, 11 Mass. 137 (1814), where the Massachusetts Supreme Court, in a case involving the damage to a chaise when the horse attached to its was spooked by the discharge of a firearm one rod away, observed, "if the plaintiff's horse and chaise were out of his sight, and had not been noticed by the defendant, and the distance was such as that no reasonable apprehension of frightening the horse could arise, supposing the horse and chaise to have been observed by the defendant, the injury is hardly to be considered as sufficiently immediate upon the act of the defendant to render him liable.." 11 Mass. at 139.

11. Any substitution of §402A's bright-line rule for negligence's foreseeability would also be contrary to the principle from *The Sea*

Petitioners misconstrue *Moragne*'s emphasis on uniformity in maritime law. It was because uniformity furthered the principle of solicitude for sailors that this Court found a cause of action for the wrongful death of a sailor in maritime law in *Moragne*, and not because solicitude furthered a policy of uniformity, as Petitioners assert. Uniformity was the means by which the goal of solicitude for sailors was achieved; uniformity was not the goal. In this case, the Third Circuit's analysis showed that the bright-line rule would not further the solicitude goal because it excluded too many injured sailors from a remedy. Pet. App. 11a-12a. The Third Circuit concluded that the foreseeability standard was the better means for achieving the fundamental goal of solicitude for sailors. Pet. App. 12a-15a. Petitioners' simply prefer uniformity in the furtherance of the interests of maritime commerce at the expense of the sailors. A formulaic resolution has long had appeal,[12] but the Third Circuit rightly rejected the alleged simplicity of a bright-line rule that was fundamentally at odds with this Court's jurisprudence.

While consistency in admiralty merits consideration, this Court has warned that any over-emphasis on uniformity in maritime law can adversely affect maritime personal injury claims. As this Court cautioned in a case allowing punitive damages in a Jones Act claim, "The

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Gull, 21 F. Cas. 909 (C.C. Md. 1865), that this Court quoted with approval in *Moragne*: "[C]ertainly it better becomes the humane and liberal character of proceedings in admiralty to give than to withhold the remedy, when not required to withhold it by established and inflexible rules." *Id.*

12. "They do things better with logarithms." Benjamin Cardozo, *The Paradoxes of Legal Science* 1 (1928).

laudable quest for uniformity in admiralty does not require the narrowing of available damages to the lowest common denominator." *Atlantic Sounding Co., Inc., v. Townsend*, 557 U.S. 404, 424 (2009).[13] The available legal theories for maritime personal injury claims by sailors should not be narrowed to a lowest common denominator of §402A strict liability, either. Petitioners argue that uniformity in maritime law requires that ships and cargo be more important than the sailors, but mercantile considerations should not overrule maritime law's primary responsibility to protect and compensate those who make that commerce possible, and in particular, those serving in our Navy who keep that commerce safe.

II. THIS CASE IS NOT RIPE FOR REVIEW BECAUSE THE THIRD CIRCUIT REMANDED IT TO THE DISTRICT COURT FOR FURTHER PROCEEDINGS.

This Petition for a Writ of Certiorari is contrary to this Court's policy against piecemeal reviews, and should be denied. As this Court held in *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251 (1916), "except in extraordinary cases, the writ is not issued until the final

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13. Petitioners' and their *amicus curiae*'s arguments are also similar to those that this Court rejected in *Sun Ship, Inc. v. Pennsylvania*, 447 U.S. 715 (1980), in which Sun Ship urged an interpretation of the Longshoreman and Harbor Workers' Compensation Act in the interest of uniformity that would have resulted in limiting an injured worker's right to compensation. This Court rejected Sun Ship's argument, stating, "To adopt appellant's position, then, would be to blunt the thrust of the 1972 amendments, and frustrate Congress' intent to aid injured maritime laborers. We refuse to do so in the name of 'uniformity.'" 447 U.S. at 726.

decree." *Id.* at 259. Petitioners seek review of orders in these cases where the litigation has not been concluded, but will continue on remand.

More recently this Court denied *certiorari* because of a similar lack of ripeness in *Brotherhood of Locomotive Firemen v. Bangor & Aroostook R.R.*, 389 U.S. 327 (1967). This Court's *per curiam* opinion stated that the case was not ripe for review because the appellate court had remanded that case back to the district court. *Id.* at 328. *See also Mt. Soledad Mem. Assoc. v. Trunk*, 567 U.S. 944, 945 (2012) (Alito, J., concurring); *Virginia Military Inst. v. United States*, 508 U.S. 946 (1993) (Scalia, J. concurring) ("We generally await final judgment in the lower courts before exercising our certiorari jurisdiction.").

In this case the Third Circuit vacated the District Court's grants of summary judgment and remanded the cases to the District Court for further proceedings. Those proceedings will include the District Court reconsidering petitioners' motions for summary judgment in light of the Third Circuit's guidance on a manufacturers' liability in negligence for injuries from a known risk of injury due to likely use of third party essential wear parts (Westinghouse) or provision of replacement asbestos parts (Foster Wheeler), followed by a trial on Petitioners' liability for Decedents' injuries should the District Court deny summary judgment. The District Court has already acknowledged that there is considerable evidence of the decedents' exposure to asbestos dust from Petitioners equipment. *See* notes 3 and 4, *supra*.

Defendants may individually proffer evidence to show that the marine equipment on which Mr. DeVries

or Mr. McAfee worked differed from equipment in general industrial use, and was manufactured to unique specifications mandated by the federal government. Should such evidence be offered, Plaintiffs will show that the equipment was no different from that used in general maritime commerce such as oil tankers and cruise ships, so Petitioners will not be able to sustain the affirmative elements of the "government specifications defense" required by this Court in *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988).[14] Plaintiffs will also contradict

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14. In another maritime asbestos case similar to the instant cases, the same district court denied summary judgment to defendants. *Willis v. BWIP Int'l, Inc.*, 811 F.Supp. 2d 1146 (E.D.Pa. 2011). The district court explained that genuine issues of material fact existed with regard to the government specifications issue there:

> Plaintiff has controverted Defendants' evidence by citing to deposition testimony to cast doubt on the averments of Defendants' experts and by submitting the testimony of their own experts...Plaintiff's experts testified that the Navy actually relied on manufacturers to place warnings on products which went to the Navy. Based on the foregoing, there are genuine issues of material fact as to whether the Navy did or did not reflect considered judgment over whether warnings could be included on Defendants' products.
>
> 811 F.Supp. 2d at 1156.

The same issues exist here. *See also Sellers v. Air & Liquid Systems Corp.*, 2014 WL 6736347 (E.D.Pa., Sept. 30, 2014). ["... Plaintiff has pointed to, *inter alia*, MIL-M-15071, which Plaintiff

some of the Petitioners-Defendants' claims that the equipment was shipped to the Navy uninsulated. Plaintiffs will demonstrate the manufacturers' participation in the design of the equipment and in the drafting of the safety manuals. Plaintiffs will also show that government specifications required that manufacturers affirmatively warn users of the hazards in working with asbestos-containing equipment, which specifications defendants disregarded. Such factual issues are appropriate for resolution at the trial court level, not in this Court.

CONCLUSION

For the reasons set forth above, Plaintiffs-Respondents respectfully request that this Court deny Defendants' Petition for a Writ of Certiorari.

Respectfully submitted,

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contends indicates that the Navy permitted warnings as deemed appropriate by defendant manufacturers. This is sufficient to raise a genuine dispute of material fact as to whether the first and second prongs of the *Boyle* test are satisfied with respect to Defendant..."].